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No. 83-748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE JOHN D. DELGADO

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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MOTION OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC. SEEKING LEAVE TO FILE A BRIEF AMICUS CURIAE

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC. AMICUS CURIAE URGING THE COURT TO GRANT PLENARY REVIEW TO THE PRESENT PETITION FOR A WRIT OF CERTIORARI

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November 30, 1983

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The National Association of Criminal Defense Lawyers, Inc. hereby moves the Court for leave to file the accompanying brief amicus curiae urging the Court to grant plenary review in the above-entitled action. Petitioner has consented to the filing of the attached brief. The Attorney General of South Carolina has reserved judgment on whether to consent until his office has an opportunity to review the brief. The interests of the National Association in this case and its reasons for seeking

leave to file the attached brief are set forth in the section of the brief entitled "Interests of Amicus Curiae."

Respectfully submitted,

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INTERESTS OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., an organization with approximately 2,700 members, is the only national organization that represents exclusively the interests of members of the criminal defense bar. The Association urges the Court to review this case for two reasons. First, the Association has an interest in establishing the principle that a lawyer has a First Amendment right to make or participate in a press interview while a proceeding for post-conviction relief is pending, so long as no imminent threat exists to the integrity of any proceeding. Second, the Association has an interest in establishing the principle that the due

process clause of the Fourteenth Amendment requires clear and convincing evidence before a lawyer may be found guilty of a disciplinary violation. The decision of the South Carolina Supreme Court violates both principles.

1. The Principle that a Lawyer has a First Amendment Right to Make or Participate in a Press Interview While a Proceeding for Post-Conviction Relief is Pending, So Long as No Imminent Threat Exists to the Integrity of Any Proceeding.

An attorney could have a number of legitimate reasons for making or participating in a press interview during a proceeding for post-conviction relief—reasons based either on his role as a representative of his client or as an individual who is entitled to First Amendment rights. For example, if the defendant has been sentenced to death, his attorney might reasonably conclude that his best strategy is to lay the groundwork for a clemency petition; that clemency is unlikely unless the public attitude is favorable; and that a press interview is necessary in order to restore some "balance" to the public image of his client. Similarly, a lawyer might represent a client who has agreed to have an interview with the press. The lawyer's presence at the interview could be important to protect the client from making damaging statements, or to assist the client in dealing with difficult questions.

An attorney may also have legitimate reasons of his own for deciding to have a press interview:

> The attorney may be especially knowledgeable and concerned about aspects of needed law reform as illustrated by the client's case. In addition, the attorney will be knowledgeable about the specific case at issue and may feel particularly moved to speak out publicly about the injustices in that case. Finally, the attorney may be the subject of well-publicized personal attacks as a result of representing an unpopular client or cause and therefore may

> have an important personal stake in publicly setting the record straight.

Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 Stan. L. Rev. 607, 616 (1977).

In this case, petitioner participated in a press interview with his client for legitimate tactical reasons. Because of the nature of the client's crime—a brutal murder that included mutilation of the body of the victim—and the publicity that it had generated, petitioner believed that public sentiment was strongly against his client and that this sentiment was having an adverse impact, in subtle ways, on his client's legal position. (Tr. 138, 151). Indeed, the prosecutor in the case labeled petitioner's client as "an animal." (Tr. 102-03; cf. Tr. 14-15; 41). Petitioner, hoping to combat this negative image, arranged for a press interview with his client. (Tr. 147, 151-52, 153). At the time of the interview, the likelihood of harm to any proceeding was remote because the judge had already issued an order in the post-conviction proceeding denying relief. If a new trial were granted, it would be years in the future.

The South Carolina Supreme Court disciplined petitioner in part because he participated in an interview between his client and a newspaper reporter. The Court based its decision on Disciplinary Rule 7-107(G) of the Code of Professional Responsibility (See Table of Disciplinary Rules). The Court rejected petitioner's argument that arranging for an interview was a legitimate part of legal representation. In addition, the Court held that 7-107(G) was constitutional, rejecting without analysis the decisions of the Fourth and Seventh Circuits, both of which held that the rule was unconstitutional on its face.

2. The Principle that the Due Process Clause of the Fourteenth Amendment Requires Clear and Convincing Evidence before a Lawyer may be Found Guilty of a Disciplinary Violation.

Members of the criminal defense bar are often subject to public criticism and antagonism because of their roles in defending and sometimes obtaining acquittal of individuals the public believes to be guilty. Unfortunately, the criticism is not limited to the public. Some members of the legal profession and of the judiciary view criminal defense lawyers with hostility. Because of these attitudes, criminal defense lawyers, more than other members of the profession, are vulnerable to charges of misconduct and in need of the protections of due process. Indeed, this case presents a striking example of the plight of a criminal defense lawyer. Petitioner's proffer of evidence at the disciplinary hearing would have shown that the complainant was a disgruntled relative of a victim of a client that petitioner successfully represented on murder charges. (Tr. 135-36, 156-57).

The decision of the South Carolina Supreme Court failed to protect petitioner's due process rights. The Court found that petitioner engaged in misrepresentation when he signed a log on his own behalf and on behalf of a newspaper reporter who accompanied him for an interview with his client at the prison where his client was incarcerated. The Court did not articulate or apply a standard of proof, and it ignored overwhelming evidence that the petitioner did not act deceptively.

ARGUMENT

The Court should grant plenary review of this case because it involves two significant questions. First, does a lawyer have a First Amendment right to make or participate in a press interview while a proceeding for post-conviction relief is pending? Second, what is the standard of proof required by the due process clause of the Fourteenth Amendment for finding an attorney guilty of misconduct in a disciplinary proceeding?

If the Court does not grant plenary review, however, it should summarily vacate the decision of the South Carolina Supreme Court because the decision violates the First Amendment principle that requires a court to make a finding in the record of "actual facts" that establish a clear and present danger to the orderly administration of justice before imposing punishment for trial publicity.

I. THE COURT SHOULD GRANT PLENARY REVIEW OF THIS CASE.

A. The Issue Of A Lawyer's First Amendment Right To Make Or Participate In A Press Interview While A Proceeding For Post-Conviction Relief Is Pending.

The South Carolina Supreme Court disciplined petitioner for participating in a press interview with his client, holding that the petitioner's conduct violated Disciplinary Rule 7-107(G) of the South Carolina Code of Professional Responsibility.[1] The Court rejected the ar-

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[1] The interview took place in the prison where petitioner was incarcerated. At the time petitioner went to the prison with the reporter, the Department of Corrections had a policy governing press interviews with inmates on death row. The policy provided that an interview would be allowed with the approval of prison officials, defense counsel and the prosecutor. This policy, however, has no relevance to the disciplinary proceeding against petitioner. The rule was not posted by the Department of Corrections and was not distributed to attorneys. (Panel Report at 4-5). Neither the petitioner nor the reporter was aware of the rule. (Tr. 85, 87, 134). Further, the Department had already approved an interview

gument that an interview could be a legitimate part of the petitioner's legal representation. The Court also rejected the claim that Disciplinary Rule 7-107(G) was unconstitutional:

> We find the same to be without merit. No case in this state has been cited and no opinion of the United States Supreme Court has been indicated. All other courts, in which there is scant authority, including the United States Circuit Court of Appeal, are not binding on this Court and can, at most, be of interest or influencing.

In re Delgado, 306 S.E. 2d 591, 596 (S.C. 1983).

This case raises a significant First Amendment issue in two ways. First, the decision of the South Carolina Supreme Court is inconsistent with well-established First Amendment principles governing publicity during judicial proceedings. Decisions of this Court establish that such publicity may be punished only when the threat to the administration of justice is extremely serious. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978); *Craig v. Harney*, 331 U.S. 367, 376 (1946); *Bridges v. California*, 314 U.S. 252, 263 (1941). Further, punishment may not be based on a mechanical application of the clear and present danger test, but must instead rest on a specific record that reflects a balancing of the evil flowing from the publicity with the need for freedom of expression. *Lankmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946).

While the Court has not applied these principles specifically to lawyers, the Court has indicated that communications by lawyers during trial proceedings may be entitled to First Amendment protection. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the Court held that a trial

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with petitioner's client. (Tr. 133-34). This case does not, therefore, involve the constitutionality of a rule that regulates prison interviews. *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

court order prohibiting communications between lawyers and potential members of a class was an abuse of discretion under Rule 23 of the Federal Rules of Civil Procedure. This Court held that such an order should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. In addition, the Court noted that the order should be carefully drawn so as to limit speech as little as possible. *Id.* at 101-02. The Court did not decide the First Amendment issue raised by the case, but pointed out that the order involved serious restraints on expression.

Second, the case is significant because the decision of the South Carolina Supreme Court is in conflict with the decisions of both the Fourth and Seventh Circuit Courts of Appeal. *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). Both courts held that the equivalent of South Carolina Disciplinary Rule 7-107(G) was unconstitutional on its face.

B. The Issue Of The Standard Of Proof Required By The Due Process Clause Of The Fourteenth Amendment In Disciplinary Proceedings.

The South Carolina Supreme Court found that the petitioner engaged in misrepresentation in violation of Disciplinary Rule 1-102(A)(4) when he completed a sign-in log at the prison. In doing so the Court did not state the standard of proof that must be met in order for a lawyer to be found guilty of a disciplinary violation, nor did it evaluate the evidence in light of any standard.[2] Further,

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[2] A previous decision of the South Carolina Supreme Court held that proof in a disciplinary proceeding must be by clear and convincing evidence. *Burns v. Clayton*, 237 S.C. 316, 334, 117 S.E.2d 300, 309 (1960). The Court mentioned this decision as the basis of its authority to impose discipline, but the Court did not articulate or apply the clear and convincing standard.

the Court ignored the following uncontradicted evidence: (1) The petitioner did not have a reason to be deceptive when he completed the sign-in log at the prison. The log was not used to control admission to the prison (Tr. 36), but solely for subsequent review by the warden. (Tr. 29). Thus, regardless of what petitioner had written, he and the reporter would have been allowed to visit the client. (2) The uncontradicted evidence was that the log was not misleading. The warden, when he routinely reviewed the sign-in log, readily identified the reporter who accompanied petitioner. Further, the warden testified that he did not find the log misleading. (Tr. 30).

This case is significant because this Court has never ruled on the standard of proof required to convict a lawyer of a disciplinary violation, nor has it reviewed state court decisions to assure compliance with a standard. In *In Re Ruffalo*, 390 U.S. 544 (1968), this Court held that lawyers were entitled to the protections of due process in disciplinary proceedings. *Id.* at 550-51. In a line of cases, this Court has held that due process requires that proof be "clear and convincing" whenever an individual is threatened with a "significant deprivation of liberty" or "stigma." *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Woodby v. I.N.S.*, 385 U.S. 276 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350 (1960) (denaturalization).

The Court has the opportunity in the present case to clarify the requirements of due process in connection with disciplinary proceedings against attorneys. Such clarification is particularly important at this time because rapid change in the legal profession is likely to generate complaints against attorneys who move beyond the traditional professional role. *Cf. In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In re Hodges*, 303 S.E.2d 89 (S.C. 1983), *peti-*

tion for cert. filed, #83-184, 52 U.S.L.W. 3122 (July 29, 1983).

C. The Court Should Not Be Deterred From Granting Certiorari Because The Petitioner Was Also Found In Violation Of Another Disciplinary Rule.

The South Carolina Supreme Court found that petitioner violated Disciplinary Rule 7-108(B)(1) when he communicated with a juror prior to the trial of a case. The record clearly indicates that the "communication" was a brief, innocuous conversation that did not relate to the merits of the case. (Tr. 49-51, 129). The hearing panel concluded that although petitioner was in technical violation of the rule, no penalty was warranted. (Panel Report at 2-3). The South Carolina Supreme Court, strictly construing the rule, based its decision to discipline petitioner in part on the violation of this rule. Petitioner does not contest the decision of the South Carolina Supreme Court that he violated this disciplinary rule.

The fact that petitioner was found in violation of Disciplinary Rule 7-108(B)(1) should not, however, prevent this Court from granting certiorari and considering the serious constitutional claims raised by this case. This Court recently held that it would not refuse to review state court decisions that involved both state and federal grounds when the state and federal grounds are "interwoven," unless "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds." *Michigan v. Long*, 103 S.Ct. 3469, 3476 (1983).

In this case the federal issues of the constitutionality of Disciplinary Rule 7-107(G) and due process were clearly interwoven into the decision. Further, the South Carolina Supreme Court did not indicate clearly and expressly in its opinion that the nonfederal ground was an independent basis for discipline. Indeed, comparison of this case with another recent decision of the South Caro-

lina Supreme Court shows that the decision in petitioner's case was based in part on the constitutional questions. In *In re Two Anonymous Members of the South Carolina Bar*, 298 S.E.2d 450 (S.C. 1982), the South Carolina Supreme Court dealt with a case in which the only charge of misconduct was a violation of Disciplinary Rule 7-108. The Court, after finding a violation of the rule, administered a private rather than a public reprimand.[3]

II. IF THE COURT DOES NOT GRANT CERTIORARI, IT SHOULD SUMMARILY VACATE THE DECISION OF THE SOUTH CAROLINA SUPREME COURT BECAUSE THAT DECISION VIOLATES THE PRINCIPLE THAT REQUIRES SPECIFIC FINDINGS OF IMMINENT HARM TO THE ADMINISTRATION OF JUSTICE BEFORE A COURT MAY INFLICT PUNISHMENT FOR TRIAL PUBLICITY.

In a line of cases, the most recent of which is *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), this Court has held that punishment for trial publicity can be imposed only after a court makes a specific inquiry into the actual facts of the case and weighs the potential evil flowing from the publicity against the need for freedom of expression. In particular, the Court condemned the mechanical restriction of speech. *Id.* at 842-43. Even if the Court decides that plenary review of this case is not appropriate, it should summarily vacate the decision of the South Carolina Supreme Court in light of the principles stated in *Landmark Communications*. This Court recently took such action in a case that in-

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[3] The distinction between a public and a private reprimand is very significant. If an attorney is publicly reprimanded and is subsequently found guilty of any misconduct, the attorney must either be indefinitely suspended or disbarred. Rules on Disciplinary Procedure of the South Carolina Sup. Ct., Rule 8(C), 22 S.C. Code Ann. 166 (Law. Coop. 1982). The effect of subsequent misconduct after a private reprimand is not as drastic. *Id.* Rule 8(D).

volved the First Amendment right of lawyers to engage in direct mail advertising. *Alessi v. Committee on Professional Standards*, 103 S. Ct. 1763 (1983), *vac'g* 88 App. Div. 2d 1089, 451 N.Y. Supp. 2d 456 (1982).

CONCLUSION

This Court should grant plenary review of this case because it involves important issues about (1) the First Amendment right of a lawyer to make or participate in a press interview with his client while a post-conviction relief proceeding is pending and (2) the due process rights of an attorney in a disciplinary proceeding. If the Court concludes, however, that plenary review is not warranted, it should summarily vacate the decision of the South Carolina Supreme Court because that decision violates the well-established First Amendment principle that punishment for trial publicity may be imposed by a court only upon specific findings showing imminent harm to the fair administration of justice.

Respectfully submitted,

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November 30, 1983

APPENDIX

TABLE OF DISCIPLINARY RULES

1. Disciplinary Rule 1-102(A)(4) of the South Carolina Code of Professional Responsibility:

A lawyer shall not:

. . .

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

2. Disciplinary Rule 7-107(G) of the South Carolina Code of Professional Responsibility:

A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved;

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

3. Disciplinary Rule 7-108(B)(1) of the South Carolina Code of Professional Responsibility:

During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.